No. 95-1081

(6)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

INGALLS SHIPBUILDING, INC. and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, IN LIQUIDATION, BY AND THROUGH THE MISSISSIPPI INSURANCE GUARANTY ASSOCIATION,

v.

Petitioners,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, AND MAGGIE YATES (Widow of Jefferson Yates),

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, SHIPBUILDERS COUNCIL OF AMERICA, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC., AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD. IN SUPPORT OF PETITIONER

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THE INTERESTS OF AMICI CURIAE

The National Association of Waterfront Employers (NAWE), formerly the National Association of Stevedores (NAS), is a not-for-profit tax exempt [26 U.S.C. § 501(c)(6)] trade association organized under the laws of the District of Columbia whose 33 member companies

are stevedore contractor/marine terminal operators doing business at 110 ports on all four of the nation's seacoasts, the states of Alaska and Hawaii, and the Commonwealth of Puerto Rico. With the exception of the members exclusively doing business in Puerto Rico, every NAWE member company employs longshore labor engaged in maritime employment subject to the Longshore and Harbor Workers' Compensation Act (LHWCA).

The Shipbuilders Council of America (SCA) is a not-for-profit trade association whose member companies are shipbuilders, ship repairers, and component manufacturers located in all sections of the country. Shipyard workers employed by SCA member companies are engaged in maritime employment subject to the LHWCA.

The Master Contracting Stevedore Association of the Pacific Coast, Inc. (MCSA) is a not-for-profit trade association whose 15 member companies provide contract stevedoring services in all principal ports in the states of California, Oregon and Washington, and provide substantially all the marine terminal and stevedoring services performed by private contractors to ocean-going vessels calling at ports in those states. MCSA member companies employ a work force of approximately 10,000 longshoremen and clerks who are engaged in maritime employment subject to the LHWCA.

Signal Mutual Indemnity Association, Ltd. is a group self-insurance facility authorized by the Secretary of Labor to secure the benefits payable under the LHWCA on a non-profit and cost effective basis for selected employers. Signal insures some 160 employers subject to the Act.

Amici collectively comprise the majority of insured and self-insured employers and insurance carriers covered by the Longshore and Harbor Workers' Compensation Act and a group self-insurance facility, and thus have an interest in conserving their financial resources by

avoiding a windfall overpayment to a dependent who claims § 9 death benefits after settling a third party wrongful death action prior to the death of a primary claimant.

Petitioner Ingalls Shipbuilding, Inc. is not a member of the Shipbuilders Council of America, nor of any other amicus on this brief.

The parties have consented to the filing of this brief. Letters of consent have been filed with the clerk pursuant to Rule 37.3 of the Court.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's reading of the Act adopts the flawed reasoning advanced by both private and federal respondents, and approved by the Benefits Review Board, the non-respondent Labor Department agency charged with review of ALJ decisions and whose final orders are subject to judicial review. In so doing, the Court reads a pension concept—vesting—which is completely alien to workers' compensation law into § 9 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, in a way that defeats the obligations imposed on all potential claimants by § 33 of the Act. The result is a decision which is diametrically opposite a recent opinion of the Ninth Circuit based on virtually identical facts. *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994).

The decision below ignores the overall structure of the Act; the fact that all LHWCA rights and obligations, including those that arise under §§ 9 and 33, spring from employment-related injury; the federal respondent's written policy, published in the *Federal Register* during a rulmaking proceeding, which negates every aspect of its litigating position taken before the court and BRB below; and, most importantly, the strong public policy, clearly re-iterated by Congress and re-affirmed by this Court in recent years, underscoring § 33's bar against double re-

covery at the expense of a covered employer's limited financial resources.

In reaching its decision, the court below also failed to grasp the import of this Court's recent opinion applicable to § 8 disability claimants, *Cowart v. Nicklos*, 505 U.S. —— (1992), and has thus placed some § 9 dependent claimants—potential widows like the private respondent —in a superior position to totally or partially disabled § 8 claimants, the Act's primary beneficiaries of recompense. Thus, by creating two different double recovery rules, the court below has placed an anomaly in the Act that neglects its very foundation, i.e., that all LHWCA liability for injury and death is employment-based. The creation of two separate rules governing liability has certainly never been sanctioned by any Congressional enactment.

In *Cowart*, the federal respondent originally took a litigating position in the circuit that favored double recovery at the employer's expense. Presumably, after it recognized that its position drew no support from the plain language of the LHWCA, its implementing regulations, or the legislative history of the 1984 Amendments to the Act, the federal respondent reversed its position, although not until after *certiorari* was granted.

Now, the federal respondent has flop-flipped and reverted to its original form, but for the first time in this Court.[1] By taking advantage of the distinction between § 9 dependent claimants and § 8 disability claimants,

[1] *Amici* are not certain whether the Federal respondent's latest iteration is at the flip stage or at the flop stage, given its recent history of taking one position followed by another on § 33 double recovery questions. *Amici* acknowledge that the federal respondent's § 9 argument is a new twist on the issue, but suggest that the Department of Labor is still attempting to litigate its interpretation of § 33 into law, despite the fact that its implementing regulations are unchanged since *Cowart* and offer no more support now than they did then.

the federal respondent has fashioned yet another litigating position by arguing against § 33's unmistakable bar against a double recovery.

At this point, given this history and the federal respondent's recent conduct resulting in other litigation involving the petitioner (See II, below), it must now be clear to even a casual observer that the federal respondent is conducting an unduly zealous and entirely questionable campaign in the courts to substitute its judgment for that of the Congress and to rewrite § 33 to fit its whim.

Federal respondent's latest effort is every bit as meritless as its original Cowart position. One need not dig too deeply to find the proof of this assertion. The federal respondent's position is absolutely contradicted by its own written policy position concerning the question of the "vesting" of LHWCA benefits and liabilities. This position was set forth in a rulemaking implementing the 1984 Amendments to the LHWCA, in which it stated in the clearest possible terms: "*[C]overage of a death claim does not turn on when 'death (is) sustained.'*" 51 *Federal Register* 4272 (Feb. 3, 1986) (emphasis added; See *n.9, infra*).

The discussion of the relationship between vesting, accrual, contingent claims, employment, injury, death, and survivor status in this rulemaking is dispositive of the question of when a dependent claimant becomes "entitled to benefits" for purposes of § 9 and/or § 33. (See. I-C below). As the federal respondent so aptly demonstrates, claimant rights and employer liability both spring from the point of an employment-related injury, and not at the point of a contingent event like death that, at most, gives rise to a claim or a cause of action.

Given the contrary nature of this rulemaking, it is not surprising that it did not surface below. One can conclude that, as in *Cowart* before the Fifth Circuit, some Departmental attorneys appear to be completely ignorant

of Departmental regulations—but always willing to respond with their agenda in the courts of appeals. Therefore, it is indeed truly ironic that the federal respondent's standing to actively respond to an appeal of an order of the Benefits Review Board by an aggrieved person pursuant to LHWCA § 21(c) is also being reviewed in this proceeding.

Nothing in the LHWCA authorizes this federal respondent—the Director, Office of Workers' Compensation—the right to "deem" itself into the federal courts as the proper federal respondent. Nor could it without doing injury to both FRAP Rule 15(a) and the entire body of law governing judicial review of final agency orders set forth in the Administrative Procedure Act. Yet Labor Department regulations, 20 CFR § 802.410(b), do just that, making a mockery of both.

And finally, the Court owes no deference to any element of the Department of Labor, be it the respondent Director, OWCP or the non-respondent Benefits Review Board.

Amici respectfully urge this Court to reverse the Fifth Circuit on both questions under review. Failure to reverse on Question number 1 will result in a repudiation of the longstanding public policy against double recovery at the expense of an employer's limited financial resources, and the circumventing of *Cowart*.

Failure to reverse on Question number 2 will result in a continuation of the federal respondent's presence in the courts of appeals, a presence which makes a mockery of the APA's judicial review limitation to *final* agency action. *Amici* are aware of no other administrator of a federal program not charged with prosecutorial duties, who continues to press the agency viewpoint as an active respondent during judicial review of the agency's own final order affecting private litigants. Under both the APA and the LHWCA, the Director's role, along with

every other element of the DoL, including the BRB, ends once an appeal is taken of a final order by an aggrieved party.

ARGUMENT

I. ALL LHWCA BENEFIT ENTITLEMENT AND OBLIGATIONS, INCLUDING THOSE CREATED BY §§ 9 AND 33, ARISE AT THE TIME OF AN EMPLOYMENT RELATED INJURY, AND DO NOT "VEST" AT A CONTINGENT EVENT—THE DEATH OF A PRIMARY CLAIMANT—AS THE COURT BELOW FOUND IN THE CASE OF § 33 ENTITLEMENT.

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA"—"Act"), is a federal workers' compensation statute enacted after this Court held that state compensation statutes could not constitutionally reach injuries incurred upon the navigable waters of the United States, *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and that Congress could not delegate the regulation of substantive maritime matters to the states, *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). Congress fashioned the Act primarily to recompense land based maritime employees for employment related injuries sustained on covered work sites. *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249 (1977).[2]

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[2] The primary purpose of the Act is to provide both medical benefits and disability (or indemnity) benefits to covered maritime workers injured on a covered situs. LHWCA § 8, 33 U.S.C. § 908, sets fourth four distinct classifications of indemnity benefits, labeled "disability" benefits, designed to recompense workers injured in the course of employment according to the severity and length of the disability. *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268 (1980). The Department has failed to provide implementing regulations covering § 8 disability claims with the exception of limited regulations governing hearing loss and occupational disease claims. 20 C.F.R. §§ 702.441 and 702.601.

LHWCA § 7, 33 U.S.C. § 907, sets forth employer obligations to provide medical care for employees injured in the course of

Notwithstanding the Act's principal purpose of providing disability and medical benefits to these primary claimants, § 9 of the Act also provides a distinct death benefit which "shall be payable" to designated survivors dependant—"*as of the time of the* [*work related*] *injury*" —on an injured worker who subsequently dies of the injury. 33 U.S.C. § 909(f). Surviving widows, such as the private respondent, are but one class of dependent claimants eligible to seek § 9 death benefits. 33 U.S.C. §§ 909(b) and (g).

Dependent claimants are third party statutory beneficiaries of the underlying employment relationship governed by the LHWCA. As with § 8 disability benefits payable to primary claimants, all employer obligated § 9 death benefits payable to surviving dependents are fixed and calculated at the point of the employment-related injury, not at the point of death. Or, in the words of the federal respondent: "Workers' compensation laws operate upon the employment relationship. The occurrence of an event or events in the course of that relationship is the foundation of any compensation-law liabilities that arise thereafter." 51 *Federal Register* 4272 (Feb. 3, 1986).

Employment-related injury is the cornerstone of the Act. All employer liability and obligations for recompense arise at this point, as do all claimants' rights and obligations, including those imposed by § 33.

Section 33 permits all claimants an additional recovery from third parties without forgoing any of the aforementioned statutory benefits. Central to the issue before this Court, § 33 permits all eligible "persons entitled to compensation"—including those to whom a § 9 death benefit is "*payable*" at some indeterminate time—to also recover damages against third parties if and when they so choose.

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employment. Corresponding OWCP regulations are found at 20 CFR § 702.401.

Section 33 is the source of considerable confusion in the appellate courts, although its terms and intent are quite clear. This confusion emanates from the federal respondent's ever shifting position. Below, it and the private respondent have fashioned a new argument that a contingent event—the death of a primary claimant—trumps the employment-related injury basis of § 33 liability and obligations.[8]

The result is differing interpretations of § 33 between the court below and the Ninth Circuit's *Cretan* court. Neither disputes that a dependent claimant who settles wrongful death claims after the death of the primary claimant is a "person entitled to compensation" for purposes of § 33 of the Act. Rather, the dispute is strictly about whether or not a person who enters into one or more pre-death settlements while the primary claimant is still alive is a "person entitled to compensation."

The Fifth Circuit's opinion adopts the BRB's position urged below by both respondents. Both reasoned that a dependant claimant who settles potential third party wrongful death claims while the primary claimant is still living cannot possibly be a "person entitled to compensation" for purposes of § 33. Rather a person can become so entitled only by virtue of first becoming "vested" with the right to claim § 9 death benefits by the death of a primary claimant.

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[8] Respondent's § 9 regulations do not support its newly framed litigating position. There are none. Like § 8, as noted above, the Department has failed to promulgate regulations implementing § 9, despite the fact that it covers an entire class of claimants. On the other hand, the department has promulgated regulations implementing § 33, which are applicable to "*every person* claiming benefits" and "any settlement . . . effected" and which do not in any respect require "vesting" of § 9 death benefits as a condition of being a person "entitled to compensation." 20 CFR § 702.281. *Amici* note that the absence of legislative regulations favors those in the Department who prefer making policy by crafting *ad hoc* litigating positions.

This interpretation requires a leap in logic starting with the premise that, because the structure of the Act distinguishes between § 8 disability benefits for injured claimants and § 9 death benefits for dependant claimants, it then follows that "the Act embodies the concept that [claimant's] action for death benefits would not be recognizable until [decedent's] death occurred." *Yates v. Ingalls Shipbuilding*, BRB Decision and Order, 28 BRBS 143 (June 29, 1994). Therefore, because a claimant's cause of action for death benefits occurs at the death of the primary claimant, a dependent cannot become a person "entitled to compensation" for purposes of § 33(g) until becoming "vested" to claim § 9 benefits by the death of a primary claimant.

That disability and death are distinct benefit categories within the Act is as irrelevant as it is obvious. Just because the Act distinguishes between the two types of benefits, it does not logically follow that each specie of benefits also has its own distinct "vesting" point, or that the concept of "vesting," if it even applies to § 9 dependent benefit claims, is at all a necessary predicate to trigger § 33(g) obligations. The plain language of § 33(a) clearly requires no such trigger.

The circuit court's interpretation does substantial harm to the workers' compensation theory at the very heart of the LHWCA. It ignores the fact that all benefit obligations and rights occur at the point of employment-related injury. And, by applying a pension concept alien to workers' compensation law—vesting—to the death of a primary claimant, an event that is no more than a contingency giving rise to a claim or a cause of action, the decision threatens the important features built into LHWCA § 33 designed to protect an employer's financial resources.

A. The Public Policy Underscoring § 33 Is Defeated By The Circuit Court's Reading Of "Vested" By Virtue Of The Death Of A Primary Claimant Into "Person Entitled To Compensation".

The Fifth Circuit's decision ignores the strong public policy underscoring § 33's principal purpose of protecting a covered employer's financial resources, while the Ninth Circuit grounded its holding firmly on this longstanding policy. The Ninth Circuit's reasoning, found squarely within compensation law, is more compelling than the Fifth Circuit's reasoning, which thrusts a pension law concept into the very heart of workers' compensation law.

The LHWCA is the primary delivery system for recompensing injured employees. The Act provides the exclusive remedy against an injured worker's employer and offers designated benefits to his/her dependents. Covered employers are liable for compensation regardless of fault.

Originally, § 33 of the LHWCA required a claimant to elect statutory compensation from the employer or file a damages suit against a third party. This election of remedies requirement was abolished in part by the 1938 amendment to the LHWCA (Act of June 25, 1938, ch. 685, §§ 12, 13, 52 Stat. 1168) and deleted entirely by the 1959 amendment to the Act. (P.L. 86-171, 73 Stat. 391). As presently written, § 33 of the LHWCA grants claimants the right to seek tort relief against third parties without waiving the right to seek LHWCA benefits. This right is assigned to employers under certain circumstances, but may revert back to the employee. LHWCA § 33(b). This assignment to employers, in and of itself, reflects the importance Congress places on making the primary delivery system—employer provided compensation insurance —whole whenever possible.

Section 33 permits claimants an additional tort recovery against third parties without losing the right to LHWCA benefits, provided claimants take certain steps

to protect the employer. These § 33 protections are of critical importance to conserving the employer/carrier financial resources necessary to fund the program, and foreclose the possibility of a double recovery at the expense of the employer, should a claimant's third party recovery prove successful. These protections are found at §§ 33(f) and (g) and are ordinarily accomplished by the employer's filing of a subrogation lien against a third party settlement or judgment, or subtracting an earlier recovery from the amount of LHWCA benefit owed.[4] Employers are obligated only for the difference, if any, between total benefits due under the LHWCA and the third party recovery. Claimants are permitted to retain any excess of a settlement or judgment which exceeds the LHWCA benefits which are payable.

This Court has recognized the importance of these statutory protections to the overall delivery of recompense to claimants. Employer insurance programs, the primary delivery system relied upon by injured workers, is to be made whole to the extent possible. See *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74, 100 S.Ct. 925 (1980); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753 (1979).

Congress intended that § 33 be read broadly to protect employers irrespective of when a claimant files a claim for compensation or files a third party action. Even recent legislative history confirms this view.

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[4] § 33(f) of the Act allows employers the right to offset the cost of a LHWCA claim against any damages recovered by a "person entitled to compensation" in order to both avoid a double recovery at the employer's expense and conserve an employer's/insurance carrier's financial resources to pay future claims. The courts have read this to permit the use of a subrogation lien.

§ 33(g) offers further protections to employers against improvident and/or secret settlements by "persons entitled to compensation." See, e.g., *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980); *Cowart v. Nicklos Drilling Co.*, 505 U.S. —— (1992).

In discussing a proposed amendment to § 33(g), which was later enacted into law, the Report of the Senate Labor and Human Resources Committee stated that the redrafted § 33(g) is designed "to assure that *all entitlement* to compensation and other benefits otherwise available under the Act is forfeited *whenever* a third-party action is resolved without the employer's formal written approval." S. Rept. 98-81, pg. 45, May 10, 1983 (Emphasis added).

Later in the legislative process, the House Education and Labor Committee Report said that the redrafted § 33(g) "further provides that if a claimant who has brought a cause of action against a third party enters into a settlement in an amount less than the amount to which the claimant would be entitled under the Longshore Act, the employer shall be responsible for additional compensation *only if* the employer has approved the settlement agreement." H. Rept. 98-570, Nov. 18, 1983, pg. 30-31 (Emphasis added).

The Ninth Circuit's *Cretan* analysis comports fully with the intentions of the two Congressional Committees of jurisdiction, and with the longstanding Congressional intent to protect an employer's limited financial resources by permitting an offset against any and all third party recoveries. It is also in keeping with the plain language of § 33. The Fifth Circuit, on the other hand, ignored the public policy behind the section, and choose to read § 9 into § 33 of the Act.

B. By Its Terms § 33 Does Not Require The Death Of A Primary Claimant Before A Dependent Claimant Becomes A "Person Entitled To Compensation" Any More Than It Requires The Death Of A Primary Claimant Before A Dependent Claimant Is Allowed To Recover Damages Against A Third Party For A Potential Wrongful Death.

The crux of respondents' argument depends on reading a condition precedent, i.e., the death of a primary claimant, into the term "entitled to compensation" as it is

found throughout § 33. But a close reading of § 33, particularly § 33(a) which establishes the overall relationship between LHWCA claims and third party actions, reveals that the death of a primary claimant is simply not a condition that governs the timing within which a person becomes "entitled to compensation" for purposes of any subsection of § 33, including § 33(g)'s forfeiture obligations at issue here.[5]

Assuming, *arguendo*, that respondents' construction is correct and that only the death of a primary claimant can "vest" a dependent claimant with the mantle of a "person entitled to [LHWCA death benefits] compensation," then logically by the terms of § 33(a), if a person should "recover damages against a third [party]" by way of a settlement of potential wrongful death claims even while the primary claimant is still alive, the person, by definition, is "not entitled" and thus falls outside of § 33(a)'s statutory right to seek a LHWCA remedy. Put another way, a "not-entitled" person who settles potential wrongful death claims loses the statutory protection afforded by the "need not elect" a remedy provision, and thus has no legal right to file a claim for § 9 death benefits upon the death of the primary claimant. (See I-C below). Read literally, claimants such as the private respondent have no right of "entitlement to compensation" under § 33.

This construction is every bit as plausible as the one advanced by respondents, but, as with their construction of § 33(g) entitlement, it defeats a principal purpose of the section, i.e., permitting a claimant both a tort remedy and a LHWCA remedy.

However, the fact is that, by the terms of § 33(a), a primary claimant's death is no more required to give

[5] LHWCA § 33(a) reads in pertinent part "If on account of disability or death for which compensation *is payable* under this Act, *the person entitled to such compensation* determines that some other person . . . is liable in damages, he need not elect to receive such compensation or to recover damages against such third party." 33 U.S.C. § 933(a) (emphasis added).

breath to the term "entitled to compensation" than it is to give effect to the term "recover damages against a third [party]" for potential wrongful death actions.[6] The election of a non-LHWCA remedy simply does not depend on first having a deceased primary claimant, and it does not negate a later § 9 claim for death benefits.

By its terms § 33(a) simply does not condition "entitlement" to death benefits on the death of a primary claimant or require that it precede the determination and pursuit of a third party recovery in any respect, only that the entitlement occur at some point in the process. The use of the present tense "is payable" indicates that the employer's obligation for death benefits is open at all times subsequent to a covered injury and relevant to the lengthy process covered by the subsection. Section 33 simply does not fix a point in time that a person becomes "entitled to benefits."

The natural reading of this section allows the dependent claimant both a LHWCA death claim if and when it arises, and a recovery against a third party—even, as below, if the recovery takes the form of a settlement of future wrongful death claims in anticipation of a death yet to occur. Obviously the private respondent below, having already achieved § 9 dependent status, had fully anticipated the forthcoming death of the injured LHWCA claimant at the time she settled her potential wrongful death claims.

[6] Section 33(a), while little more than an unpunctuated, run-on sentence, is phrased in the present tense but is clearly applicable to an unfolding series of events starting at the point of a covered injury and ending after the death of the primary claimant, should such a death so occur. Re-phrased, as it concerns § 9 death benefit claims, the subsection would read thus: "If . . . the person entitled to [death benefits payable under § 9] determines that some other person . . . is liable in damages [for the death of a primary claimant] . . . he need not elect . . . ." It is readily apparent that the timing of the "entitlement" relative to the "determination" of third party liability is indeterminant.

Therefore, recovery from a third party by way of a settlement of potential wrongful death claims, fully satisfies the § 33(a) statutory scheme, and does not eliminate a claimant's obligations to comply with § 33(g), as urged by both private and federal respondents.

There is nothing contradictory in *Cowart* as it applies to § 8 disability claims. *Cowart* held that § 33 entitlement obligations arise at the point of injury, not later at the point of actually receiving benefits. By its terms, § 33 requires no less of dependent claimants.

C. The LHWCA Statutory Scheme Compels The Conclusion That § 9 Dependency Status Attaches At The Point Of An Employment-Related Injury, And Not Upon The Death Of The Primary Claimant.

LHWCA § 9 obligates covered employers to provide certain death benefits payable to the eligible surviving dependents of a deceased maritime worker injured in the course of employment. Surviving spouses will ordinarily qualify, as the respondent below does. LHWCA §§ 9(b) and (g).

To establish the dependent status necessary to claim § 9 death benefits, several conditions must first be satisfied. Foremost is the absolute requirement of dependency as of the time of the underlying injury. § 9(f).[7] In addition, the Act also requires that the surviving spouse meet one of several additional requirements, normally continued dependency, at the time of decedent's death. § 2(16).[8]

[7] LHWCA § 9(f) provides "All questions of dependency shall be determined *as of the time of the injury.*" 33 U.S.C. § 909(f) (emphasis added).

[8] LHWCA § 2(16) provides: "The terms 'widow or widower' includes only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death; or living apart for justifiable cause or by reason of his or her desertion at such time." 33 U.S.C. § 902(16).

Failure of either requirement defeats dependency status, and thus the right to claim a death benefit.

It is dependency on the injured primary claimant, starting at the time of the injury and concluding with the time of death that confers dependency status. Dependency status is employment based. It alone places a potential claimant into the zone of interests protected by § 9. It alone confers on a dependent the right to claim § 9 death benefits, even though contingent on the death of a primary claimant, as below.

Heretofore, the federal respondent shared this view. According to her written policy, employment-related injury alone gives rise to all future benefit claims, including death claims. The resulting right to claim death benefits, among other rights conferred by the Act, are no more than "future liabilities resulting from [employment events], though contingent in duration and amount on future events (*and hence neither 'accrued' nor 'vested'*) . . . [and are] incurred by the employers . . . *at the time of the employment events.*" The federal respondent concluded: *[C]overage of a death claim does not turn on when 'death (is) sustained.'*" 51 *Federal Register* 4272 (Feb. 3, 1986) (emphasis added).[9]

[9] In this Rulemaking promulgating the final regulations implementing the 1984 Amendments to the LHWCA, P.L. 98-426, it became necessary to explain the relationship between the LHWCA, as amended, and the recently enacted amendments to the District of Columbia Compensation Act, and the effect of the two statutes on all injuries, deaths, benefit entitlement, employer liabilities, etc., that had the appearance of being commonly covered by both statutes. In the course of explaining why the law in effect at the time of the injury governed all subsequent claims, including death claims, the federal respondent clearly proclaimed the view that death benefits are no more than contingent liabilities based on injury incurred during the employment relationship. The right to death benefits arises, not when "death is sustained" but at the point of employment-related injury, and does *not* accrue or vest, but is "contingent" on some future event, in this case the death of the primary claimant. Now the federal respondent is pressing the opposite view in the courts. It cannot have it both ways.

The LHWCA § 9(f) makes it clear that a dependent claimant's right to recover § 9 death benefits attaches at the point of dependency, i.e., an employment-related injury, the very same point at which a primary claimant's right to recover medical and disability benefits attaches. The point of injury also fixes *all* employer benefit obligations to claimants eligible to receive benefits, whether § 8 disability or § 9 death benefits.

D. "Vesting"—A Pension Concept—Is Completely Alien To Workers' Compensation Law And Must Be Abandoned.

Despite federal respondent's written policy, it is now pushing a contrary *ad hoc* litigating position, and is urging that the term "vested," culled from this Court's *Cowart* opinion, is indeed applicable in the context of LHWCA death benefit claims and places its occurrence at the point of death of a primary claimant, furhter arguing that it is a necessary condition before a person can become "entitled to benefits" for purposes of § 33.

The use of the term is less than suitable to workers' compensation law or to the LHWCA benefit structure, and ought to be abandoned right here. But, *amici* suggest that if the term is applied as it is commonly used in the pension arena, it actually defeats the conclusion of the court below that only the death of a primary claimant "vests" a dependent claimant with the absolute right to receive § 9 death benefits, and thus § 33(g) entitlement obligations.

A participant in a defined benefit pension plan normally vests upon satisfying the plan's vesting requirements, an event that may occur long before the participant retires. Retirement, or some lesser act permitted by the terms of the plan, triggers the claim for pension benefits and/or a cause of action against the plan for failure to provide them. Because there is a lag time between "vesting" and "pay status" there is no absolute certainty that a "vested"

participant will actually receive benefits. For example, the premature death of a "vested" claimant may induce forfeiture of all benefits, and relieve the plan of any further financial obligation to the participant. Moreover, even though fully "vested," a participant could in fact experience a deep cut in the benefit to which he/she is entitled, should the plan be underfunded, terminated and placed in the Employee Retirement Income Security Act Title IV insurance program, P.L. 93-406.

Similarly, LHWCA § 9 dependency status arises at the point of injury. All rights and obligations imposed by the Act spring from this point. This may well occur much earlier than at the death of the primary claimant, as it did below. Like retirement in the pension analogy, the death of a primary claimant triggers a claim for death benefits. Also, as in the pension analogy, a potential § 9 dependent may never actually recover any death benefits because, *inter alia,* the dependent may not live longer than the primary claimant or the primary claimant may die of other causes. These contingencies, however, do not negate the fact that the dependent is still "vested" by virtue of the status conferred by the employment related injury.

The court below read the term "vesting" as requiring an absolute right to a benefit, and compounded its error of adopting the term to the LHWCA in the first place, by placing "vesting" at the point of a contingent event: the death of a primary claimant. The Court reasoned that it could not possibly occur any earlier because this would subject a dependent claimant to the possibility of being divested by any number of subsequent events beyond her control. As just noted though, even a vested participant in a defined benefit pension plan is not absolutely protected from becoming divested of vested benefits because of subsequent events beyond the participant's control.

Regardless of the fact that, as just pointed out, the term can be read in a manner compatible with the statute,

as this Court did in *Cowart*,[10] the circuit court's reading of the concept of "vesting" into the Act is just plain bad law for the following reasons. First, the concept has no application to the LHWCA benefit structure as witnessed by the court's application of the concept to the wrong point in the LHWCA scheme, at the contingency of death. As noted above this reading ignores the fact that all LHWCA benefit obligations and rights arise at the point of an employment-related injury, and not at the point of such a contingency. Secondly, forcing this alien concept into the Act can only add more legal chaos to the system. Thirdly, the court has simply confused the concept of vesting with the concept of a cause of action. And finally, adding insult to injury, its reading permits some—but not all—dependent survivors a windfall benefit over those granted to the primary claimant, in clear violation of the language and public policy underlying § 33.

II. DEFERENCE IS NOT OWED TO THE FEDERAL RESPONDENT.

The federal respondent's position is entirely an *ad hoc* litigating position, first taken before the BRB and then before the Fifth Circuit. It is not reflected in the LHWCA or in respondent's implementing regulations and, in fact, is expressly contradicted by the OWCP rulemaking noted above. It is solely the product of departmental lawyering made "on behalf of" the Director, OWCP—who, *amici* submit, is not even the proper FRAP Rule 15(a) respondent (See III, below)—and advanced by the non-policy making Benefits Review Board, an agency that this Court recently acknowledged is owed no deference by the Courts. *Cowart*, slip opinion at 9.

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[10] In that case the Court utilized the term in a general sense and placed it at the point where it belongs, if at all, i.e., at the point of employment-related injury.

Yet the federal respondent seeks deference to its interpretation of LHWCA § 33 first and only advanced in litigation. This Court has determined that the litigating "views" of an agency do not warrant deference if they are not supported by agency "regulations, rulings or administrative practice" and has "declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position. . ." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, at 212 (1988).

Such is the case here. Even more telling, the federal respondent's litigating position is entirely contradicted by its own regulatory rulemaking, as noted above, and therefore entitled to even less deference than it would be otherwise. An agency interpretation. . . . "which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987). (citations omitted).

Consequently, as to the federal respondent's position on the purely LHWCA issues involved in Question No. 1, *amici* submit that the views of the federal respondent cannot possibly be entitled to deference.

Remarkably, the Director argues that its views on Question No. 2 are also entitled to deference. See Brief for Federal Respondent opposing the Petition for a Writ of *Certiorari*, p. 15. This assertion is absurd. Deference to an administrative agency on an interpretation of its own generic statute is one thing, but deference on an interpretation of FRAP Rule 15(a) and the judicial review provisions of the LHWCA, which incorporate the Administrative Procedure Act ("APA"), see *Director, OWCP v. Newport News Shipbuilding*, —— U.S. —— (1995), are entirely another matter. Interpretations of Rule 15(a) and the APA are solely within the prerogative of the courts. Deference here is not justified, as inter-

pretations involving either a Federal Rule or the APA are simply beyond the competence of this federal respondent.

Amici suggest that there is yet another reason why this Court should not defer to the federal respondent. Judging from its recent conduct involving the routine administration of the Act, and its persistence in continuing to press its unsubstantiated view of § 33 on the BRB and the courts, it appears to *amici* that the federal respondent is engaged in a crusade. Since *Cowart*, it has acted defiantly in performing its non-discretionary statutory obligations involving § 33 third party claims. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130 (5th Cir. 1994), and has ignored the gist of a district court order, *Ingalls Shipbuilding, Inc. v. Director, OWCP and Wilber Boone*, Nos. 94-10778 *et al.*, —— F.3d —— (5th Cir. 1996). Conduct such as this simply cannot be condoned, let alone rewarded. Federal lawyers have obligations beyond conducting a holy war against a disfavored party. See *Freeport-McMoRAN Oil & Gas Co. v. F.E.R.C.*, 962 F.2d 45 (D.C. Cir. 1992).[11]

Amici submit that deference to the federal respondent under these circumstances is out of the question.

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[11] This conduct is compounded by the fact that, while departmental lawyers have made an artform of arguing their way into the appellate courts, often taking *ad hoc* litigating positions in the process, see, e.g., *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, —— U.S. —— (1995); *Director, OWCP v. Greenwich Collieries*, —— U.S. —— (1994); and *Cowart v. Nicklos Drilling Co.*, 505 U.S. —— (1992), the Director, as pointed out above, has yet to promulgate legislative regulations implementing two of the key sections of the Act, §§ 8 and 9. Regulation is being made through litigation.

III. THE FEDERAL RESPONDENT IS WITHOUT LAWFUL AUTHORITY TO CONTINUE ENGAGING A DISFAVORED PARTY IN THE COURTS ONCE AN AGGRIEVED PARTY APPEALS A FINAL ORDER OF THE BRB.

Two separate legal regimes govern whether or not a federal entity can properly come before a court of appeals on an appeal of a final agency order by an aggrieved party. First, Rule 15(a) of the Federal Rules of Appellate Procedure governs "[r]eview of an order" of an administrative agency, board, etc., and requires that "the agency must be named respondent." While the rule does use the term "agency," it clearly contemplates that it is the agency issuing the final order subject to appeal that is to be named federal respondent ("agency will include agency, board, commission or officer"). For LHWCA cases, that agency is the Benefits Review Board, not the Director, Office of Workers' Compensation Programs. LHWCA § 21(c).

No other interpretation of the Rule makes sense. However, the federal respondent has "deemed" itself, through its regulations, "to be the proper party on behalf of the Secretary of Labor in all review proceedings" into the role of the federal respondent, thus usurping the authority of FRAP Rule 15(a) designating the proper federal respondent as the agency whose order is under review. 20 CFR § 802.410(b). A DoL regulation cannot be sufficient to overcome the force of an Appellate Rule.

Not content to merely usurp the BRB, the federal respondent has also parlayed respondency status into an active participatory role before the appellate courts, a role unlike any other non-prosecutorial administrative agency. It has accomplished this by promulgating a whole host of interlocking regulations, including the following: 20

CFR § 702.333(b); 20 CFR § 801.2(a)(10); 20 CFR § 802.410(b).[12]

Despite these regulations, the federal respondent's presence runs afoul of the second legal regime governing agency conduct in the apellate courts, the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* Despite the federal respondent's then strong protestations to the contrary, the APA applies to LHWCA adjudications, *Director, OWCP v. Greenwich Collieries*, —— U.S. —— (1944), and along with LHWCA § 21(c), governs judicial review of BRB final orders; *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, —— U.S. —— (1995).

Both LHWCA § 21(c) and APA § 704 clearly indicate that only final agency action is to be the subject of judicial review sought by an aggrieved party. Inherent in this requirement is the precept that agency involvement is through once a final order is issued. Final agency action means final agency action, and not another chance or two to litigate against a disfavored party, or change a final order of the BRB in disagreement with the position of the administrator of the Act.

Under both the LHWCA and the APA, the federal respondent's lawful role is limited to those activities pointed out by this Court in *Newport News*, Slip opinion at 9. Whatever the Director's permissible statutory role during the administrative hearing stage, it ends once an appeal is taken of a *final* BRB order.

It's that simple.

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[12] *Amici* note that it has been 15 months since this Court's *Newport News* opinion denied the federal respondent the right to appeal a BRB final order to the circuit courts, and that the Director has yet to make an effort to conform these regulations with this opinion.

CONCLUSION

The LHWCA governs the legal rights and obligations of covered maritime employers and workers injured on a covered situs. It also grants designated dependents status and the right to be recompensed should an injured claimant subsequently die of the employment-related injury. The common statutory basis applicable to every claim, however, is that all arise at the point of the employment-related injury. This fundamental premise of the Act applies equally to claims governed by §§ 9 and 33. This fact is acknowledged in the written policy issued by the federal respondent during the rulemaking noted above, but ignored by her lawyers in the agency judicial process and appellate review below.

Respondents' "vesting" argument isolates some § 33 third party claims and obligations from the rest of the Act, thereby creating two different rules of law for claims arising out of the same set of facts. Thus, the continuity between benefits designed into the Act by Congress is destroyed.

As this Court has acknowledged, there is a strong public policy underscoring § 33 and its importance to the rest of the LHWCA benefit scheme. "Vesting," a pension law concept alien to workers' compensation law, has no place in this scheme, and therefore must be abandoned.

As pointed out above, the federal respondent's *ad hoc* litigating position can only be construed to contradict the LHWCA scheme, public policy, and the federal respondent's prior written position on the very question before the Court. The usual basis for judicial deference—reasonable and in keeping with statutory authority—is, then, notably missing. Thus, the federal respondent's position deserves no deference on the first question before the Court.

Despite FRAP Rule 15(a) and the LHWCA/APA requirement of final agency action, this federal respond-

ent has built a regulatory platform carving out for itself an active participatory role in the courts. It is both a pretender to the throne and, literally, an officious intermeddler. On this question, the position advanced by the federal respondent also warrants no deference. It is past time that the federal respondent be placed on par with other administrative agencies of its character.

Therefore, *amici* submit that the Court below erred on both questions and must be reversed.

Respectfully submitted,

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